

1 Christopher S. Marchese (170239)
2 marchese@fr.com
3 FISH & RICHARDSON P.C.
4 555 West Fifth Street, 31st Floor
5 Los Angeles, CA 90013
6 Telephone: (213) 533-4240
7 Facsimile: (877) 417-2378

8 Kurt L. Glitzenstein (Pro Hac Vice)
9 glitzenstein@fr.com
10 FISH & RICHARDSON P.C.
11 One Marina Park Drive
12 Boston, MA 02210-1878
13 Telephone: (617) 542-5070
14 Facsimile: (617) 542-8906

15 Olga I. May (232012)
16 omay@fr.com
17 FISH & RICHARDSON P.C.
18 12390 El Camino Real
19 San Diego, California 92130
20 Telephone: (858) 678-4745
21 Facsimile: (858) 678-5099

22 Attorneys for Plaintiffs
23 CARL ZEISS AG and ASML
24 NETHERLANDS B.V.

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IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION
CARL ZEISS AG and ASML
NETHERLANDS B.V.,

Plaintiffs,

v.

NIKON CORPORATION, SENDAI
NIKON CORPORATION, and NIKON
INC.,

Defendants.

Case No. 2:17-cv-03221-RGK (MRWx)

STIPULATED PROTECTIVE ORDER

Judge: Hon. R. Gary Klausner
Magistrate Judge: Hon. Michael R. Wilner

1 Vincent J. Belusko (100282)
2 VBelusko@mofo.com
3 Roman A. Swoopes (274167)
4 RSwoopes@mofo.com
5 MORRISON & FOERSTER LLP
6 707 Wilshire Boulevard
7 Los Angeles, CA 90017-3543
8 Telephone: 213.892.5200
9 Facsimile: 213.892.5454

10 Jack W. Londen (85776)
11 JLonden@mofo.com
12 Shaelyn K Dawson (288278)
13 shaelyndawson@mofo.com
14 MORRISON & FOERSTER LLP
15 425 Market Street
16 San Francisco, CA 94105-2482
17 Telephone: 415.268.7000
18 Facsimile: 415.268.7522

19 Attorneys for Defendants
20 NIKON CORPORATION, SENDAI
21 NIKON CORPORATION, and NIKON INC.
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1. INTRODUCTION

1.1 PURPOSES AND LIMITATIONS

Disclosure and discovery activity in this Action are likely to involve production of confidential, proprietary, or private information for which special protection from public disclosure and from use for any purpose other than prosecuting this Action may be warranted. Accordingly, the parties hereby stipulate to and petition the court to enter the following Stipulated Protective Order. The parties acknowledge that this Order does not confer blanket protections on all disclosures or responses to discovery and that the protection it affords from public disclosure and use extends only to the limited information or items that are entitled to confidential treatment under the applicable legal principles. The parties further acknowledge, as set forth in Section 13.3, below, that this Stipulated Protective Order does not entitle them to file confidential information under seal; Civil Local Rule 79-5 sets forth the procedures that must be followed and the standards that will be applied when a party seeks permission from the court to file material under seal.

1.2 GOOD CAUSE STATEMENT

Some of the material expected to be exchanged between the parties is information that is not generally available to the public, and that is maintained in confidence by the Producing Party. Special protection from public disclosure and from use for any purpose other than prosecution of this Action is warranted. Examples of confidential information that the parties may seek to protect from unrestricted or unprotected disclosure include:

- (a) Information that is the subject of a non-disclosure or confidentiality agreement or obligation;
- (b) The names, or other information tending to reveal the identity of a party's supplier, designer, distributor, or customer;

- 1 (c) Agreements with third parties, including license agreements, distributor
2 agreements, manufacturing agreements, design agreements,
3 development agreements, supply agreements, sales agreements, or
4 service agreements;
- 5 (d) Research and development information;
- 6 (e) Proprietary engineering or technical information, including product
7 design, manufacturing techniques, processing information, drawings,
8 memoranda, source code, and reports;
- 9 (f) Information related to budgets, sales, profits, costs, margins, licensing
10 of technology or designs, product pricing, or other internal
11 financial/accounting information, including non-public information
12 related to financial condition or performance and income or other non-
13 public tax information;
- 14 (g) Information related to internal operations including personnel
15 information and confidential business practices;
- 16 (h) Information related to past, current and future product development;
- 17 (i) Information related to past, current and future market analyses and
18 business and marketing development, including plans, strategies,
19 forecasts and competition;
- 20 (j) Trade secrets (as defined by the jurisdiction in which the information is
21 located); and
- 22 (k) Information that may be privileged or otherwise protected from
23 disclosure under state or federal statutes, court rules, case decisions, or
24 common law.

25 Unrestricted or unprotected disclosure of such confidential technical,
26 commercial or personal information would result in prejudice or harm to the
27 Producing Party by revealing the Producing Party's competitive confidential
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1 information, which has been developed at the expense of the Producing Party and
2 which represents valuable tangible and intangible assets of that party. Additionally,
3 privacy interests must be safeguarded. Accordingly, the parties respectfully submit
4 that there is good cause for the entry of this Protective Order.

5 It is the intent of the parties that information will not be designated as
6 confidential for tactical reasons and that nothing will be so designated without a
7 good faith belief that there is good cause why it should not be part of the public
8 record of this case.

9 The parties agree, subject to the Court's approval, that the following terms
10 and conditions shall apply to this Action.

11 **2. DEFINITIONS**

12 2.1 Action: CARL ZEISS AG and ASML NETHERLANDS B.V. v.
13 NIKON CORPORATION, SENDAI NIKON CORPORATION, and NIKON INC.,
14 Case No. 2:17-cv-03221-RGK (MRWx).

15 2.2 Challenging Party: A Party or Non-Party that challenges the
16 designation of information or items under this Order.

17 2.3 "CONFIDENTIAL" Information or Items: Protected Data, information
18 (regardless of how it is generated, stored or maintained), and/or tangible things that
19 qualify for protection under Federal Rule of Civil Procedure 26(c), and as specified
20 above in the Good Cause Statement. For the purposes of the Protective Order,
21 Protected Data means any information that a party believes in good faith to be
22 subject to federal, state or foreign data protection laws or other privacy obligations.
23 Such data protection laws include the Federal Data Protection Act,
24 (Bundesdatenschutzgesetz) (BDSG), which regulates data protection in Germany
25 and the Dutch Personal Data Protection Act, which applies in the Netherlands. Other
26 examples of such data protection laws include, without limitation, the Gramm-
27 Leach-Bliley Act, 15 U.S.C. § 6801 et seq. (financial information); The Health
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1 Insurance Portability and Accountability Act and the regulations thereunder, 45 CFR
2 Part 160 and Subparts A and E of Part 164 (medical information); Directive
3 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the
4 Protection of Individuals with Regard to the Processing of Personal Data and on the
5 Free Movement of Such Data, 1995 O.J. (L281/31) (European Union personal
6 information); Data Protection Act 1998 (c. 29) (United Kingdom personal
7 information); the Belgian Law of December 8, 1992 on Privacy Protection in
8 relation to the Processing of Personal Data (Belgium personal information); and The
9 Personal Information Protection Act (Law No. 57 of 2003) (Japan personal
10 information).

11 Protected Data constitutes highly sensitive materials requiring special
12 protection, including, but not limited to, “information concerning the personal or
13 material circumstances of an identified or identifiable individual” as defined in
14 Section 3(1) of the Federal Data Protection Act.

15 2.4 “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY”
16 Information or Items: Extremely sensitive “Confidential Information or Items,”
17 disclosure of which to another Party or Non-Party would create a substantial risk of
18 serious harm that could not be avoided by less restrictive means.

19 2.5 “HIGHLY CONFIDENTIAL – SOURCE CODE” Information or
20 Items: Extremely sensitive discovery material that contains or substantively relates
21 to a party’s Source Code. For purposes of this Order, “Source Code” means source
22 code, computer code, object code (*i.e.*, computer instructions and data definitions
23 expressed in a form suitable for input to an assembler, compiler, or other translator),
24 microcode, pseudocode, source code listings and descriptions of source code, object
25 code listings and descriptions of object code, register transfer language (“RTL”),
26 firmware, and hardware description language (“HDL”), as well as any and all
27 programmer notes, annotations, revision histories, and other comments of any type
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1 related thereto and accompanying the code. For avoidance of doubt, this includes,
2 but is not limited to, source files, make files, intermediate output files, executable
3 files, header files, resource files, binaries, scripts, algorithms, library files, module
4 definition files, map files, object files, linker files, browse info files, and debug files.

5 2.6 Counsel (without qualifier): Outside Counsel of Record and House
6 Counsel (as well as their support staff).

7 2.7 Designating Party: A Party or Non-Party that designates information or
8 items that it produces in disclosures or in responses to discovery as
9 “CONFIDENTIAL,” “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES
10 ONLY,” or “HIGHLY CONFIDENTIAL – SOURCE CODE.”

11 2.8 Disclosure or Discovery Material: All items or information, regardless
12 of the medium or manner in which it is generated, stored, or maintained (including,
13 among other things, testimony, transcripts, and tangible things), that are produced or
14 generated in disclosures or responses to discovery in this matter.

15 2.9 Expert: A person with specialized knowledge or experience in a matter
16 pertinent to this Action who (1) has been retained by a Party or its counsel to serve
17 as an expert witness or as a consultant in this Action, (2) is not a past or current
18 employee of a Party or of a Party’s competitor, and (3) at the time of retention, is not
19 anticipated to become an employee of a Party or of a Party’s competitor.

20 2.10 House Counsel: Attorneys who are employees of a party to this Action.
21 House Counsel does not include Outside Counsel of Record or any other outside
22 counsel.

23 2.11 Non-Party: Any natural person, partnership, corporation, association, or
24 other legal entity not named as a Party to this Action.

25 2.12 Outside Counsel of Record: Attorneys who are not employees of a
26 party to this Action but are retained to represent or advise a party to this Action and
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1 have appeared in this Action on behalf of that party or are affiliated with a law firm
2 which has appeared on behalf of that party, and includes support staff.

3 2.13 Party: Any party to this Action, including all of its officers, directors,
4 employees, consultants, retained experts, and Outside Counsel of Record (and their
5 support staffs).

6 2.14 Producing Party: A Party or Non-Party that produces Disclosure or
7 Discovery Material in this Action.

8 2.15 Professional Vendors: Persons or entities that provide litigation support
9 services (e.g., stenographers, photocopying, videotaping, translating, preparing
10 exhibits or demonstrations, and organizing, storing, or retrieving data in any form or
11 medium) and their employees and subcontractors.

12 2.16 Protected Material: Any Disclosure or Discovery Material that is
13 designated as “CONFIDENTIAL,” “HIGHLY CONFIDENTIAL – ATTORNEYS’
14 EYES ONLY,” or “HIGHLY CONFIDENTIAL – SOURCE CODE.”

15 2.17 Receiving Party: A Party that receives Disclosure or Discovery
16 Material from a Producing Party.

17 **3. SCOPE**

18 The protections conferred by this Stipulation and Order cover not only
19 Protected Material (as defined above), but also (1) any information copied or
20 extracted from Protected Material; (2) all copies, excerpts, summaries, or
21 compilations of Protected Material; and (3) any testimony, conversations, or
22 presentations by Parties or their Counsel that might reveal Protected Material.
23 However, the protections conferred by this Stipulation and Order do not cover the
24 following information: (a) any information that is in the public domain at the time of
25 disclosure to a Receiving Party or becomes part of the public domain after its
26 disclosure to a Receiving Party as a result of publication not involving a violation of
27 this Order, including becoming part of the public record through trial or otherwise;
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1 and (b) any information known to the Receiving Party prior to the disclosure or
2 obtained by the Receiving Party after the disclosure from a source who obtained the
3 information lawfully and under no obligation of confidentiality to the Designating
4 Party.

5 Any use of Protected Material at trial will be governed by the orders of the
6 trial judge.

7 **4. DURATION**

8 Even after final disposition of this Action, the confidentiality obligations
9 imposed by this Order shall remain in effect until a Designating Party agrees
10 otherwise in writing or a court order otherwise directs. Final disposition shall be
11 deemed to be the later of (1) dismissal of all claims and defenses in this Action, with
12 or without prejudice; and (2) final judgment herein after the completion and
13 exhaustion of all appeals, rehearings, remands, trials, or reviews of this Action,
14 including the time limits for filing any motions or applications for extension of time
15 pursuant to applicable law.

16 **5. DESIGNATING PROTECTED MATERIAL**

17 **5.1 Exercise of Restraint and Care in Designating Material for Protection.**

18 Each Party or Non-Party that designates information or items for protection under
19 this Order must take care to limit any such designation to specific material that
20 qualifies under the appropriate standards. To the extent it is practical to do so, the
21 Designating Party must designate for protection only those parts of material,
22 documents, items, or oral or written communications that qualify – so that other
23 portions of the material, documents, items, or communications for which protection
24 is not warranted are not swept unjustifiably within the ambit of this Order.

25 If it comes to a Designating Party's attention that information or items that it
26 designated for protection do not qualify for protection at all or do not qualify for the
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1 level of protection initially asserted, that Designating Party must promptly notify all
2 other parties that it is withdrawing the mistaken designation.

3 5.2 Manner and Timing of Designations. Except as otherwise provided in
4 this Order (see, e.g., second paragraph of Section 5.2(a) below), or as otherwise
5 stipulated or ordered, Disclosure or Discovery Material that qualifies for protection
6 under this Order must be clearly so designated before the material is disclosed or
7 produced.

8 Designation in conformity with this Order requires:

9 (a) For information in documentary form (e.g., paper or electronic documents,
10 but excluding transcripts of depositions or other pretrial or trial proceedings), that
11 the Producing Party affix the legend “CONFIDENTIAL,” “HIGHLY
12 CONFIDENTIAL – ATTORNEYS’ EYES ONLY,” or “HIGHLY
13 CONFIDENTIAL – SOURCE CODE” to each page that contains Protected
14 Material. To the extent it is practical to do so, if only a portion or portions of the
15 material on a page qualifies for protection, the Producing Party also must clearly
16 identify the protected portion(s) (e.g., by making appropriate markings in the
17 margins) and must specify, for each portion, the level of protection being asserted.

18 A Party or Non-Party that makes original documents or materials available for
19 inspection need not designate them for protection until after the inspecting Party has
20 indicated which material it would like copied and produced. During the inspection
21 and before the designation, all of the material made available for inspection except
22 for Source Code shall be deemed “HIGHLY CONFIDENTIAL – ATTORNEYS’
23 EYES ONLY” and Source Code shall be deemed “HIGHLY CONFIDENTIAL –
24 SOURCE CODE.” After the inspecting Party has identified the documents it wants
25 copied and produced, the Producing Party must determine which documents, or
26 portions thereof, qualify for protection under this Order. Then, before producing the
27 specified documents, the Producing Party must affix the appropriate legend
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1 (“CONFIDENTIAL,” “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES
2 ONLY,” or “HIGHLY CONFIDENTIAL – SOURCE CODE”) to each page that
3 contains Protected Material. If only a portion or portions of the material on a page
4 qualifies for protection, the Producing Party also must clearly identify the protected
5 portion(s) (e.g., by making appropriate markings in the margins) and must specify,
6 for each portion, the level of protection being asserted.

7 (b) For testimony given in deposition or in other pretrial or trial proceedings,
8 that the Designating Party identify on the record, before the close of the deposition,
9 hearing, or other proceeding, all protected testimony and specify the level of
10 protection being asserted. When it is impractical to identify separately each portion
11 of testimony that is entitled to protection and it appears that substantial portions of
12 the testimony may qualify for protection, the Designating Party may invoke on the
13 record (before the deposition, hearing, or other proceeding is concluded) a right to
14 have up to 30 days to identify the specific portions of the testimony as to which
15 protection is sought and to specify the level of protection being asserted. Only those
16 portions of the testimony that are appropriately designated for protection within the
17 30 days shall be covered by the provisions of this Stipulated Protective Order.
18 Alternatively, a Designating Party may specify, at the deposition or up to 30 days
19 afterwards if that period is properly invoked, that the entire transcript shall be treated
20 as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES
21 ONLY.”

22 The use of a document as an exhibit at a deposition shall not in any way
23 affect the document’s designation as “CONFIDENTIAL,” “HIGHLY
24 CONFIDENTIAL – ATTORNEYS’ EYES ONLY,” or “HIGHLY
25 CONFIDENTIAL – SOURCE CODE.”

26 Transcripts containing Protected Material shall have an obvious legend on the
27 title page that the transcript contains Protected Material, and the title page shall be
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1 followed by a list of all pages (including line numbers as appropriate) that have been
2 designated as Protected Material and the level of protection being asserted by the
3 Designating Party. The Designating Party shall inform the court reporter of these
4 requirements. Any transcript that is prepared before the expiration of a 30-day
5 period for designation shall be treated during that period as if it had been designated
6 “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” in its entirety unless
7 otherwise agreed. After the expiration of that period, the transcript shall be treated
8 only as actually designated.

9 (c) For information produced in some form other than documentary and for
10 any other tangible items, that the Producing Party affix in a prominent place on the
11 exterior of the container or containers in which the information or item is stored the
12 legend “CONFIDENTIAL,” “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES
13 ONLY,” or “HIGHLY CONFIDENTIAL – SOURCE CODE.” If only a portion or
14 portions of the information or item warrant protection, the Producing Party, to the
15 extent practicable, shall identify the protected portion(s) and specify the level of
16 protection being asserted.

17 5.3 Inadvertent Failures to Designate. If timely corrected, an inadvertent
18 failure to designate qualified information or items does not, standing alone, waive
19 the Designating Party’s right to secure protection under this Order for such material.
20 Upon timely correction of a designation, the Receiving Party must make reasonable
21 efforts to assure that the material is treated in accordance with the provisions of this
22 Order.

23 **6. CHALLENGING CONFIDENTIALITY DESIGNATIONS**

24 6.1 Timing of Challenges. Any Party or Non-Party may challenge a
25 designation of confidentiality at any time that is consistent with the Court’s
26 Scheduling Order. Unless a prompt challenge to a Designating Party’s
27 confidentiality designation is necessary to avoid foreseeable, substantial unfairness,
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unnecessary economic burdens, or a significant disruption or delay of this Action, a Party does not waive its right to challenge a confidentiality designation by electing not to mount a challenge promptly after the original designation is disclosed.

6.2 Meet and Confer. The Challenging Party shall initiate the dispute resolution process (and, if necessary, file a discovery motion) under Local Rule 37.1 et seq. To avoid ambiguity as to whether a challenge has been made, the written notice must recite that the challenge to confidentiality is being made in accordance with this specific paragraph of the Protective Order. The parties shall attempt to resolve each challenge in good faith and must begin the process by conferring directly within 14 days of the date of service of notice. In conferring, the Challenging Party must explain the basis for its belief that the confidentiality designation was not proper and must give the Designating Party an opportunity to review the designated material, to reconsider the circumstances, and, if no change in designation is offered, to explain the basis for the chosen designation. A Challenging Party may proceed to the next stage of the challenge process only if it has engaged in this meet and confer process first or establishes that the Designating Party is unwilling to participate in the meet and confer process in a timely manner.

6.3 Judicial Intervention. If the Parties cannot resolve a challenge without court intervention, the parties must meet-and-confer pursuant to Local Rule 37-1. If the parties are unable to come to an agreement, the parties must submit a joint stipulation setting forth the issues, as required by Local Rule 37-1 within 21 days of the initial notice of challenge or within 14 days of the parties agreeing that the meet and confer process will not resolve their dispute, whichever is earlier, and conforms to the Local Rules. Under Local Rule 37-2, each written stipulation must be filed and served with the notice of the motion.

The burden of persuasion in any such challenge proceeding shall be on the Designating Party. Frivolous challenges and those made for an improper purpose

(e.g., to harass or impose unnecessary expenses and burdens on other parties) may expose the Challenging Party to sanctions. Unless the parties submit a joint stipulation, all parties shall continue to afford the material in question the level of protection to which it is entitled under the Producing Party's designation until the court rules on the challenge.

7. ACCESS TO AND USE OF PROTECTED MATERIAL

7.1 Basic Principles. A Receiving Party may use Protected Material that is disclosed or produced by another Party or by a Non-Party in connection with this case only for prosecuting, defending, or attempting to settle this Action. Specifically, all Protected Material shall be used solely for this case or any related appellate proceeding, and not for any other purpose whatsoever, including without limitation any other litigation, patent prosecution or acquisition, patent reexamination or reissue proceedings, or any business or competitive purpose or function, unless otherwise agreed to by the Parties or ordered by the court. Protected Material shall not be distributed, disclosed or made available to anyone except as expressly provided in this Order.

Such Protected Material may be disclosed only to the categories of persons and under the conditions described in this Order. When the Action has been terminated, a Receiving Party must comply with the provisions of Section 15 below (FINAL DISPOSITION).

Protected Material must be stored and maintained by a Receiving Party at a location and in a secure manner that ensures that access is limited to the persons authorized under this Order.

Any party receiving Protected Material shall take technical and organizational security measures that are appropriate to the risks, such as unauthorized access, presented by the processing. Any person acting under the authority of a Receiving Party, including a data processor, must not process the data except on instructions

1 from the Receiving Party. Any party receiving Protected Material shall have in place
2 procedures so that any third party it authorizes to have access to the Protected
3 Material, including processors, will respect and maintain the confidentiality and
4 security of the Protected Material.

5 7.2 Disclosure of “CONFIDENTIAL” Information or Items. Unless
6 otherwise ordered by the court or permitted in writing by the Designating Party, a
7 Receiving Party may disclose any information or item designated
8 “CONFIDENTIAL” only to:

9 (a) the Receiving Party’s Outside Counsel of Record in this Action, as well as
10 employees of said Outside Counsel of Record to whom it is reasonably necessary to
11 disclose the information for this Action and who have signed the “Acknowledgment
12 and Agreement to Be Bound” that is attached hereto as Exhibit A;

13 (b) the officers, directors, and employees (including House Counsel) of the
14 Receiving Party to whom disclosure is reasonably necessary for this Action and who
15 have signed the “Acknowledgment and Agreement to Be Bound” (Exhibit A);

16 (c) Experts (as defined in this Order) of the Receiving Party to whom
17 disclosure is reasonably necessary for this Action and who have signed the
18 “Acknowledgment and Agreement to Be Bound” (Exhibit A);

19 (d) the Court and its personnel;

20 (e) court reporters and their staff, professional jury or trial consultants, and
21 Professional Vendors to whom disclosure is reasonably necessary for this Action
22 and who have signed the “Acknowledgment and Agreement to Be Bound” (Exhibit
23 A);

24 (f) the author or recipient of a document containing the information or a
25 custodian or other person who otherwise possessed or knew the information.

26 (g) during their depositions, witnesses, and attorneys for witnesses, in the
27 Action to whom disclosure is reasonably necessary provided: (1) the deposing party
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1 requests that the witness sign the form attached as Exhibit A hereto; and (2) they
2 will not be permitted to keep any confidential information unless they sign the
3 “Acknowledgment and Agreement to Be Bound” (Exhibit A), unless otherwise
4 agreed by the Designating Party or ordered by the Court. Pages of transcribed
5 deposition testimony or exhibits to depositions that reveal Protected Material must
6 be separately bound by the court reporter and may not be disclosed to anyone except
7 as permitted under this Stipulated Protective Order; and

8 (h) any mediator or settlement officer, and their supporting personnel,
9 mutually agreed upon by any of the parties engaged in settlement discussions.

10 7.3 Disclosure of “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES
11 ONLY” Information or Items. Unless otherwise ordered by the court or permitted in
12 writing by the Designating Party, a Receiving Party may disclose any information or
13 item designated “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” only
14 to:

15 (a) the Receiving Party’s Outside Counsel of Record in this Action, as well as
16 employees of said Outside Counsel of Record to whom it is reasonably necessary to
17 disclose the information for this Action and who have signed the “Acknowledgment
18 and Agreement to Be Bound” that is attached hereto as Exhibit A;

19 (c) Experts of the Receiving Party (1) to whom disclosure is reasonably
20 necessary for this Action, (2) who have signed the “Acknowledgment and
21 Agreement to Be Bound” (Exhibit A), and (3) as to whom the procedures set forth in
22 Section 7.4(a), below, have been followed;

23 (d) the Court and its personnel;

24 (e) court reporters and their staff, professional jury or trial consultants, and
25 Professional Vendors to whom disclosure is reasonably necessary for this Action
26 and who have signed the “Acknowledgment and Agreement to Be Bound” (Exhibit
27 A); and
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1 (f) the author or recipient of a document containing the information or a
2 custodian or other person who otherwise possessed or knew the information.

3 7.4 Procedures for Approving or Objecting to Disclosure of “HIGHLY
4 CONFIDENTIAL – ATTORNEYS’ EYES ONLY” or “HIGHLY CONFIDENTIAL
5 – SOURCE CODE” Information or Items to Experts.

6 (a) Unless otherwise ordered by the court or agreed to in writing by the
7 Designating Party, a Party that seeks to disclose to an Expert (as defined in this
8 Order) any Information or Item that has been designated “HIGHLY
9 CONFIDENTIAL – ATTORNEYS’ EYES ONLY” or “HIGHLY CONFIDENTIAL
10 – SOURCE CODE” pursuant to Section 7.3(b) first must make a written request to
11 the Designating Party that (1) identifies the general categories of “HIGHLY
12 CONFIDENTIAL – ATTORNEYS’ EYES ONLY” or “HIGHLY CONFIDENTIAL
13 – SOURCE CODE” information that the Receiving Party seeks permission to
14 disclose to the Expert, (2) sets forth the full name of the Expert and the city and state
15 of his or her primary residence, (3) attaches a copy of the Expert’s current resume,
16 (4) identifies the Expert’s current employer(s), (5) identifies each person or entity
17 from whom the Expert has received compensation or funding for work in his or her
18 areas of expertise or to whom the Expert has provided professional services,
19 including in connection with a litigation, at any time during the preceding five
20 years,¹ and (6) identifies (by name and number of the case, filing date, and location
21 of court) any litigation in connection with which the Expert has offered expert
22 testimony, including through a declaration, report, or testimony at a deposition or
23 trial, during the preceding five years.

24 _____
25 ¹ If the Expert believes any of this information is subject to a confidentiality
26 obligation to a third party, then the Expert should provide whatever information the
27 Expert believes can be disclosed without violating any confidentiality agreements,
28 and the Party seeking to disclose to the Expert shall be available to meet and confer
with the Designating Party regarding any such engagement.

1 (b) A Party that makes a request and provides the information specified in the
2 preceding respective paragraphs may disclose the subject Protected Material to the
3 identified Expert unless, within 14 days of delivering the request, the Party receives
4 a written objection from the Designating Party. Any such objection must set forth in
5 detail the grounds on which it is based.

6 (c) A Party that receives a timely written objection must meet and confer with
7 the Designating Party (through direct voice to voice dialogue) to try to resolve the
8 matter by agreement within seven days of the written objection. If no agreement is
9 reached, the Party seeking to make the disclosure to the Expert may file a motion as
10 provided in Civil Local Rule 7 (and in compliance with Civil Local Rule 79-5, if
11 applicable) seeking permission from the court to do so. Any such motion must
12 describe the circumstances with specificity, set forth in detail the reasons why the
13 disclosure to the Expert is reasonably necessary, assess the risk of harm that the
14 disclosure would entail, and suggest any additional means that could be used to
15 reduce that risk. In addition, any such motion must be accompanied by a competent
16 declaration describing the parties' efforts to resolve the matter by agreement (i.e.,
17 the extent and the content of the meet and confer discussions) and setting forth the
18 reasons advanced by the Designating Party for its refusal to approve the disclosure.

19 In any such proceeding, the Party opposing disclosure to the Expert shall bear
20 the burden of proving that the risk of harm that the disclosure would entail (under
21 the safeguards proposed) outweighs the Receiving Party's need to disclose the
22 Protected Material to its Expert.

23 7.5 Disclosure of "HIGHLY CONFIDENTIAL – SOURCE CODE"
24 Information or Items. A party or non-party may designate Source Code as
25 "HIGHLY CONFIDENTIAL – SOURCE CODE" if it comprises or includes
26 confidential, proprietary, or trade secret Source Code. Unless otherwise ordered by
27 the Court or permitted in writing by the Designating Party, Source Code designated
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1 as HIGHLY CONFIDENTIAL – SOURCE CODE shall be subject to the following
2 provisions:

3 (a) Protected Material designated as “HIGHLY CONFIDENTIAL –
4 SOURCE CODE” shall be subject to all of the protections afforded to “HIGHLY
5 CONFIDENTIAL – ATTORNEYS’ EYES ONLY” information and may be
6 disclosed only to the individuals to whom “HIGHLY CONFIDENTIAL –
7 ATTORNEYS’ EYES ONLY” information may be disclosed, as set forth in
8 Paragraphs 7.3 and 7.4.

9 (b) Any Source Code produced in discovery shall be made available for
10 inspection, in a format allowing it to be reasonably reviewed and searched, during
11 normal business hours or at other mutually agreeable times, at an office of the
12 Producing Party’s counsel or another mutually agreed upon location. Unless
13 otherwise agreed to by the Parties, Source Code produced by Nikon will be made
14 available in Nikon’s outside counsel’s offices in Los Angeles or San Francisco.
15 Source code produced by Zeiss/ASML will be made available in Zeiss/ASML’s
16 outside counsel’s offices in at least Washington D.C. and San Diego. The Source
17 Code shall be made available for inspection on a secured computer in a secured
18 room without Internet access or network access to other computers, and the
19 Receiving Party shall not copy, remove, or otherwise transfer any portion of the
20 Source Code onto any recordable media or recordable device. The Producing Party
21 may visually monitor the activities of the Receiving Party’s representatives during
22 any Source Code review from outside the review room, but only to ensure that there
23 is no unauthorized recording, copying, or transmission of the Source Code. Such
24 monitoring shall not entail review of any work product generated by the Receiving
25 Party, e.g., monitoring the screen of the secure computer, monitoring any surface
26 reflecting any notes or work product of the Receiving Party, or monitoring the key
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1 strokes of the Receiving Party. There will be no video supervision by the Producing
2 Party.

3 (c) The Receiving Party may request that commercially available software
4 tools for viewing and searching Source Code be installed on the secured PC. The
5 Receiving party must provide the Producing Party a CD, DVD, or other media
6 containing such software tools, or links for a download at least 4 days in advance of
7 the inspection. The Receiving Party shall be responsible for providing a license for
8 the use of the review and search tools.

9 (d) The Receiving Party may request paper copies of limited portions of
10 Source Code that are reasonably necessary for the preparation of court filings,
11 pleadings, expert reports, or other papers, or for deposition or trial, but shall not
12 request paper copies for the purposes of reviewing the Source Code other than
13 electronically as set forth in paragraph (b) in the first instance. The Producing Party
14 shall provide all such Source Code in paper form including bates numbers and the
15 label "HIGHLY CONFIDENTIAL – SOURCE CODE." The Producing Party may
16 challenge the amount of Source Code requested in hard copy form pursuant to the
17 dispute resolution procedure and timeframes set forth in Section 6 whereby the
18 Producing Party is the "Challenging Party" the and Receiving Party is the
19 "Designating Party" for purposes of dispute resolution. As a general matter, no
20 more than an aggregate total of 2,000 pages of Source Code should be printed during
21 the duration of the case. If the Receiving Party wishes to print more pages beyond
22 this page limit, the parties shall meet and confer in good faith and the Producing
23 Party shall not unreasonably withhold permission to the Receiving Party to exceed
24 the page limit.

25 (e) The Receiving Party shall maintain a record of any individual who has
26 inspected any portion of the Source Code in electronic or paper form. The Receiving
27 Party shall maintain all paper copies of any printed portions of the Source Code in a
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1 secured, locked area. Similarly, the Receiving Party shall maintain derivative
2 materials created using Source Code, such as any notes of an Expert, in a secured,
3 locked area. The Receiving Party shall not create any electronic or other images of
4 the paper copies and shall not convert any of the information contained in the paper
5 copies into any electronic format. The Receiving Party shall only make additional
6 paper copies if such additional copies are (1) necessary to prepare court filings,
7 pleadings, or other papers (including a testifying expert's expert report), (2)
8 necessary for deposition, or (3) otherwise necessary for the preparation of its case.
9 Any paper copies used during a deposition shall be retrieved by the Producing Party
10 at the end of each day and must not be given to or left with a court reporter or any
11 other individual.

12 **8. DISCOVERY FROM EXPERTS OR CONSULTANTS**

13 (a) Absent good cause, drafts of reports of testifying experts, and reports and
14 other written materials, including drafts, of consulting experts, shall not be
15 discoverable.

16 (b) Reports and materials exempt from discovery under the foregoing
17 Paragraph shall be treated as attorney work product for the purposes of this case and
18 Protective Order.

19 (c) Testifying experts shall not be subject to discovery with respect to any
20 draft of his or her report(s) in this case. Draft reports, notes, or outlines for draft
21 reports developed and drafted by the testifying expert and/or his or her staff are also
22 exempt from discovery.

23 (d) Discovery of materials provided to testifying experts shall be limited to
24 those materials, facts, consulting expert opinions, and other matters actually relied
25 upon by the testifying expert in forming his or her final report, trial, or deposition
26 testimony or any opinion in this case. No discovery can be taken from any non-
27 testifying expert except to the extent that such non-testifying expert has provided
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1 information, opinions, or other materials to a testifying expert relied upon by that
2 testifying expert in forming his or her final report(s), trial, and/or deposition
3 testimony or any opinion in this case.

4 (e) No conversations or communications between counsel and any testifying
5 or consulting expert will be subject to discovery unless the conversations or
6 communications are relied upon by such experts in formulating opinions that are
7 presented in reports or trial or deposition testimony in this case.

8 (f) Materials, communications, and other information exempt from discovery
9 under the foregoing Paragraphs 8(a)–(e) shall be treated as attorney work product for
10 the purposes of this litigation and Order.

11 (g) Nothing in Protective Order, include Paragraphs 8(a)–(e), shall alter or
12 change in any way the requirements in Section 7.5 regarding Source Code, and
13 Section 7.5 shall control in the event of any conflict.

14 **9. PROTECTED MATERIAL SUBPOENAED OR ORDERED**
15 **PRODUCED IN OTHER LITIGATION**

16 If a Party is served with a subpoena or a court order issued in other litigation
17 that compels disclosure of any information or items designated in this Action as
18 “CONFIDENTIAL,” “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES
19 ONLY,” or “HIGHLY CONFIDENTIAL – SOURCE CODE” that Party must:

20 (a) Promptly notify in writing the Designating Party. Such notification shall
21 include a copy of the subpoena or court order;

22 (b) Promptly notify in writing the party who caused the subpoena or order to
23 issue in the other litigation that some or all of the material covered by the subpoena
24 or order is subject to this Protective Order. Such notification shall include a copy of
25 this Stipulated Protective Order; and

26 (c) Cooperate with respect to all reasonable procedures sought to be pursued
27 by the Designating Party whose Protected Material may be affected.

1 If the Designating Party timely seeks a protective order, the Party served with
2 the subpoena or court order shall not produce any information designated in this
3 Action as “CONFIDENTIAL,” “HIGHLY CONFIDENTIAL – ATTORNEYS’
4 EYES ONLY,” or “HIGHLY CONFIDENTIAL – SOURCE CODE” before a
5 determination by the court from which the subpoena or order issued, unless the Party
6 has obtained the Designating Party’s permission. The Designating Party shall bear
7 the burden and expense of seeking protection in that court of its confidential material
8 – and nothing in these provisions should be construed as authorizing or encouraging
9 a Receiving Party in this Action to disobey a lawful directive from another court.

10 **10. A NON-PARTY’S PROTECTED MATERIAL SOUGHT TO BE**
11 **PRODUCED IN THIS ACTION**

12 (a) The terms of this Order are applicable to information produced by a
13 Non-Party in this Action and designated as “CONFIDENTIAL,” “HIGHLY
14 CONFIDENTIAL – ATTORNEYS’ EYES ONLY,” or “HIGHLY
15 CONFIDENTIAL – SOURCE CODE.” Such information produced by Non-Parties
16 in connection with this Action is protected by the remedies and relief provided by
17 this Order. Nothing in these provisions should be construed as prohibiting a Non-
18 Party from seeking additional protections.

19 (b) In the event that a Party is required, by a valid discovery request, to
20 produce a Non-Party’s confidential information in its possession, and the Party is
21 subject to an agreement with the Non-Party not to produce the Non-Party’s
22 confidential information, then the Party shall:

23 1. Promptly notify in writing the Requesting Party and the Non-Party that
24 some or all of the information requested is subject to a confidentiality agreement
25 with a Non-Party;
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1 2. Promptly provide the Non-Party with a copy of the Stipulated
2 Protective Order in this Action, the relevant discovery request(s), and a reasonably
3 specific description of the information requested; and

4 3. Make the information requested available for inspection by the Non-
5 Party.

6 (c) If the Non-Party fails to object or seek a protective order from this court
7 within 21 days of receiving the notice and accompanying information, the Receiving
8 Party may produce the Non-Party's confidential information responsive to the
9 discovery request. If the Non-Party timely seeks a protective order, the Receiving
10 Party shall not produce any information in its possession, custody, or control that is
11 subject to the confidentiality agreement with the Non-Party before a determination
12 by the court. Absent a court order to the contrary, the Non-Party shall bear the
13 burden and expense of seeking protection in this court of its Protected Material.

14 **11. UNAUTHORIZED DISCLOSURE OF PROTECTED MATERIAL**

15 If a Receiving Party learns that, by inadvertence or otherwise, it has disclosed
16 Protected Material to any person or in any circumstance not authorized under this
17 Stipulated Protective Order, the Receiving Party must immediately (a) notify in
18 writing the Designating Party of the unauthorized disclosures, (b) use its best efforts
19 to retrieve all unauthorized copies of the Protected Material, (c) inform the person or
20 persons to whom unauthorized disclosures were made of all the terms of this Order,
21 and (d) request such person or persons to execute the "Acknowledgment and
22 Agreement to Be Bound" that is attached hereto as Exhibit A.

23 **12. INADVERTENT PRODUCTION OF PRIVILEGED OR OTHERWISE**
24 **PROTECTED MATERIAL**

25 When a Producing Party gives notice to Receiving Parties that certain
26 inadvertently produced material is subject to a claim of privilege or other protection,
27 the obligations of the Receiving Parties are those set forth in Federal Rule of Civil
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1 Procedure 26(b)(5)(B). This provision is not intended to modify whatever procedure
2 may be established in an e-discovery order that provides for production without prior
3 privilege review. Pursuant to Federal Rule of Evidence 502(d) and (e), insofar as the
4 parties reach an agreement on the effect of disclosure of a communication or
5 information covered by the attorney-client privilege or work product protection, the
6 parties may incorporate their agreement in the stipulated protective order submitted
7 to the court.

8 Upon a request from any Producing Party who has inadvertently produced
9 Discovery Material that it believes is privileged and/or protected, each Receiving
10 Party shall immediately return such Protected Material or Discovery Material and all
11 copies to the Producing Party, except for any pages containing privileged markings
12 by the Receiving Party which shall instead be destroyed and certified as such by the
13 Receiving Party to the Producing Party.

14 If the Receiving Party has disclosed the information to others before being
15 notified of the claim of privilege or protection, the Receiving Party must take
16 reasonable steps to retrieve and return or destroy the disclosed information. No use
17 shall be made of such documents or information during deposition or at trial, nor
18 shall such documents or information be shown to anyone after the request that they
19 be returned. If a claim is disputed, the Receiving Party shall not use or disclose a
20 document or information for which a claim of privilege or immunity is made
21 pursuant to this paragraph for any purpose until the matter is resolved by agreement
22 of the Parties or by a decision of this court.

23 Nothing in this Protective Order shall require disclosure of material that a
24 Party contends is protected from disclosure by attorney-client privilege or the
25 attorney work-product immunity or any other applicable form of immunity. This
26 shall not preclude any Party from moving the court for an order directing the
27 disclosure of such material.

1 **13. MISCELLANEOUS**

2 13.1 Right to Further Relief. Nothing in this Order abridges the right of any
3 person to seek its modification by the court in the future.

4 13.2 Right to Assert Other Objections. By stipulating to the entry of this
5 Protective Order no Party waives any right it otherwise would have to object to
6 disclosing or producing any information or item on any ground not addressed in this
7 Stipulated Protective Order. Similarly, no Party waives any right to object on any
8 ground to use in evidence of any of the material covered by this Protective Order.

9 13.3 Filing Protected Material. Without written permission from the
10 Designating Party or a court order secured after appropriate notice to all interested
11 persons, a Party may not file in the public record in this Action any Protected
12 Material. A Party that seeks to file under seal any Protected Material must comply
13 with Civil Local Rule 79-5. Protected Material may only be filed under seal pursuant
14 to a court order authorizing the sealing of the specific Protected Material at issue.
15 Pursuant to Civil Local Rule 79-5, a sealing order will issue only upon a request
16 establishing that the Protected Material at issue is privileged, protectable as a trade
17 secret, or otherwise entitled to protection under the law. If a Receiving Party's
18 request to file Protected Material under seal pursuant to Civil Local Rule 79-5 is
19 denied by the court, then the Receiving Party may file the Protected Material in the
20 public record pursuant to Civil Local Rule 79-5 unless otherwise instructed by the
21 court.

22 **14. PATENT PROSECUTION BAR**

23 Absent the written consent of the Producing Party, any person on behalf of the
24 Receiving Party who receives one or more items designated “CONFIDENTIAL –
25 ATTORNEYS’ EYES ONLY” or “CONFIDENTIAL – ATTORNEYS’ EYES
26 ONLY – SOURCE CODE” by a Producing Party shall not be involved, directly or
27 indirectly, in any of the following activities: (i) advising on, consulting on,
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1 preparing, prosecuting, drafting, editing, and/or amending of patent applications,
2 specifications, claims, and/or responses to office actions, or otherwise affecting the
3 scope of claims in patents or patent applications relating to the functionality,
4 operation, and/or design of technology concerning digital cameras and components
5 thereof (generally or as described in any patent in suit), before any foreign or
6 domestic agency, including the United States Patent and Trademark Office; and (ii)
7 the acquisition of patents (including patent applications), or the rights to any such
8 patents or patent applications with the right to sublicense, relating to the
9 functionality, operation, and design of technology concerning digital cameras and
10 components thereof. These prohibitions are not intended to and shall not preclude
11 counsel from participating in proceedings on behalf of a Party challenging the
12 validity of any patent, and these prohibitions are not intended to and shall not
13 preclude counsel for the Receiving Party from participating in reexamination, inter
14 partes review proceedings, or covered business method review to defend the validity
15 of any challenged patent, but counsel for the Receiving Party may not participate in
16 the crafting of amended claims in any such proceedings. These prohibitions shall
17 begin when access to “CONFIDENTIAL – ATTORNEYS’ EYES ONLY” or
18 “CONFIDENTIAL – ATTORNEYS’ EYES ONLY – SOURCE CODE” materials
19 are first received by the affected individual, and shall end two (2) years after the
20 final resolution of this action, including all appeals.

21 **15. FINAL DISPOSITION**

22 Within 60 days after the final disposition of this Action, as defined in Section
23 4, each Receiving Party must return all Protected Material to the Producing Party or
24 destroy such material. As used in this subdivision, “all Protected Material” includes
25 all copies, abstracts, compilations, summaries, and any other format reproducing or
26 capturing any of the Protected Material. Whether the Protected Material is returned
27 or destroyed, the Receiving Party must submit a written certification to the
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1 Producing Party (and, if not the same person or entity, to the Designating Party) by
2 the 60-day deadline that (1) identifies (by category, where appropriate) all the
3 Protected Material that was returned or destroyed and (2) affirms that the Receiving
4 Party has not retained any copies, abstracts, compilations, summaries or any other
5 format reproducing or capturing any of the Protected Material. Notwithstanding this
6 provision, Counsel are entitled to retain an archival copy of all pleadings, motion
7 papers, trial, deposition, and hearing transcripts, legal memoranda, correspondence,
8 deposition and trial exhibits, expert reports, attorney work product, and consultant
9 and expert work product, even if such materials contain Protected Material. Any
10 such archival copies that contain or constitute Protected Material remain subject to
11 this Protective Order as set forth in Section 4 (DURATION).

12 **16. VIOLATIONS**

13 Any willful violation of this Order may be punished by civil or criminal
14 contempt proceedings, financial or evidentiary sanctions, reference to disciplinary
15 authorities, or other appropriate action at the discretion of the Court.
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1 IT IS SO STIPULATED, THROUGH COUNSEL OF RECORD.

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3 Dated: November 9, 2017

FISH & RICHARDSON P.C.

4 By: /s/ Christopher S. Marchese

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6 Christopher S. Marchese
7 (SBN 170239), marchese@fr.com
8 FISH & RICHARDSON P.C.
9 555 West Fifth Street, 31st Floor
10 Los Angeles, CA 90013
11 Telephone: (213) 533-4240
12 Facsimile: (877) 417-2378

13 Kurt L. Glitzenstein (Pro Hac Vice to
14 be filed), glitzenstein@fr.com
15 FISH & RICHARDSON P.C.
16 One Marina Park Drive
17 Boston, MA 02210-1878
18 Telephone: (617) 542-5070
19 Facsimile: (617) 542-8906

20 Olga I. May
21 (SBN 232012), omay@fr.com
22 FISH & RICHARDSON P.C.
23 12390 El Camino Real
24 San Diego, California 92130
25 Telephone: (858) 678-4745
26 Facsimile: (858) 678-5099

27 Attorneys for Plaintiffs
28 CARL ZEISS AG AND ASML
NETHERLANDS B.V.

29 Dated: November 9, 2017

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2
3 By: /s/ Vincent J. Belusko

4 Vincent J. Belusko (100282)
5 VBelusko@mofo.com
6 Roman A. Swoopes (274167)
7 RSwoopes@mofo.com
8 MORRISON & FOERSTER LLP
9 707 Wilshire Boulevard
10 Los Angeles, CA 90017-3543
11 Telephone: 213.892.5200
12 Facsimile: 213.892.5454

13 Jack W. Londen (85776)
14 JLonden@mofo.com
15 Shaelyn K Dawson (288278)
16 shaelyndawson@mofo.com
17 MORRISON & FOERSTER LLP
18 425 Market Street
19 San Francisco, CA 94105-2482
20 Telephone: 415.268.7000
21 Facsimile: 415.268.7522

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28 Attorneys for Defendants
NIKON CORPORATION, SENDAI
NIKON CORPORATION, and NIKON
INC.

PURSUANT TO STIPULATION, IT IS SO ORDERED.

DATED: November 13, 2017



Michael R. Wilner
United States Magistrate Judge

1 EXHIBIT A

2 ACKNOWLEDGMENT AND AGREEMENT TO BE BOUND

3 I, _____ [print or type full name], of
4 _____ [print or type full address], declare under penalty of perjury
5 that I have read in its entirety and understand the Stipulated Protective Order that
6 was issued by the United States District Court for the Central District of California
7 on _____ [date] in the case of CARL ZEISS AG and ASML
8 NETHERLANDS B.V. v. NIKON CORPORATION, SENDAI NIKON
9 CORPORATION, and NIKON INC., Case No. 2:17-cv-03221-RGK (MRWx). I
10 agree to comply with and to be bound by all the terms of this Stipulated Protective
11 Order and I understand and acknowledge that failure to so comply could expose me
12 to sanctions and punishment in the nature of contempt. I solemnly promise that I will
13 not disclose in any manner any information or item that is subject to this Stipulated
14 Protective Order to any person or entity except in strict compliance with the
15 provisions of this Order.

16 I further agree to submit to the jurisdiction of the United States District Court
17 for the Northern District of California for the purpose of enforcing the terms of this
18 Stipulated Protective Order, even if such enforcement proceedings occur after
19 termination of this action.

20 I hereby appoint _____ [print or type full name] of
21 _____ [print or type full address and
22 telephone number] as my California agent for service of process in connection with
23 this action or any proceedings related to enforcement of this Stipulated Protective
24 Order.

25 Date: _____

26 City and State where sworn and signed: _____

27 Printed name: _____

1 [printed name]

2 Signature: _____

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/s/ *K. Nicole Williams*

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